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Conflict of Laws -- Nonrecognition of Foreign Custody Decrees

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CASES NOTED

CONFLICT OF LAWS – NONRECOGNITION OF FOREIGN CUSTODY DECREES

Appellant was awarded custody of her child in a divorce proceeding in Mississippi. She then consented to let the child visit his grandparents, appellees, who refused to return the child. The appellant instituted habeas corpus proceedings in Mississippi which resulted in a judgment ordering the grandparents to return the child. Upon the entry of this judgment, she took the child and immediately departed from Mississippi. Unknown to her, the grandparents had appealed from the final judgment and obtained a reversal in the Supreme Court of Mississippi.[1] On remand, the case proceeded in an ex parte fashion resulting in a decree awarding custody of the child to the grandparents. Armed with this decree, the grandparents instituted habeas corpus proceedings in Florida. The trial court considered itself bound by the final decree rendered by the Mississippi trial court and confined its attention to facts occurring since the date of the Mississippi decree in order to determine whether a change in circumstances which would justify a modification of the custody provisions had occurred. The court concluded that the evidence before it failed to show a sufficient change and awarded custody to the grandparents in accordance with the Mississippi decree. On appeal, *held*, reversed: the courts of Florida are not bound by foreign custody decrees. They are authorized to consider the manner in which the case was litigated in deciding whether to recognize the decree under the doctrine of *comity*. *Neal v. State ex rel. Neal*, 135 So.2d 891 (Fla. App. 1961).

Custody decrees are not final decrees, but may be modified for the welfare of the child. The effect of the full faith and credit clause upon these decrees has confronted the courts frequently during the past century.[2] Is a court asked to enforce a valid[3] custody decree, rendered by a foreign state court, bound

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1. Neal v. Neal, 238 Miss. 572, 119 So.2d 273 (1960).

2. Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953); Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROB. 819 (1944); Comment, 11 U. FLA. L. REV. 337 (1958); Comment, 13 U. MIAMI L. REV. 101 (1958); 27 TUL. L. REV. 361 (1953); 47 CALIF. L. REV. 750 (1959).

3. If the sister state court lacked jurisdiction over the person or subject matter (when the child is outside the court's jurisdiction), then recognition need not be granted to the decree rendered. Cooper v. Cooper, 229 Ark. 770, 318 S.W.2d 587 (1958) (person); Boardman v. Boardman, 135 Conn. 124, 62 A.2d 521 (1958) (subject matter);

by that decree as to the facts and circumstances existing at the time of its rendition? Or, may it modify that decree to promote what it considers to be the welfare of the child, disregarding the findings of fact by the foreign court? The Supreme Court of the United States has had at least two opportunities to answer these questions, but has avoided the issue.[4] The overwhelming majority of the states have adhered to the rule that in the absence of a change in circumstances, the decree of a foreign state court awarding custody of a child is entitled to full faith and credit.[5] This rule demands that when a court is asked to modify a foreign custody decree, it must limit its consideration to facts and circumstances which have occurred subsequent to the rendition of the original decree.[6] It appears that the Supreme Court might also adhere to this view.[7] The insistence on a change in circumstances before a modification will be granted precludes the parent from forum shopping and insures that the child will not be subject to frequent residential changes.[8]

The main objection to the "change in circumstances" rule seems to be that although the court may think the child's welfare demands a modification of the custody decree, it is bound to recognize the foreign decree when a "change" is not present.[9] Primarily for this reason a minority of jurisdictions maintain that the welfare of the child is the ultimate consideration, and the lack of a change in circumstances will not prevent the

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Winters v. Winters, 236 Miss. 624, 111 So.2d 418 (1959) (person); Steele v. Steele, 152 Miss. 365, 118 So. 721 (1928) (person); *In re* Rice, 316 S.W.2d 329 (Mo. App. 1958) (subject matter); Davis v. Davis, 156 N.E.2d 494 (Ohio C.P. 1959) (subject matter); Burden v. Burden, 44 Tenn. App. 312, 313 S.W.2d 566 (1957) (subject matter); Best v. Best, 331 S.W.2d 364 (Tex. Civ. App. 1959) (subject matter); Eule v. Eule, 9 Wis. 2d 115, 100 N.W.2d 554 (1960) (subject matter).

4. Kovacs v. Brewer, 356 U.S. 604 (1958); State *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947).

5. Thomas v. Barnett, 229 Ark. 692, 318 S.W.2d 154 (1958); Ogles v. Warren, 148 Conn. 255, 170 A.2d 140 (1961); Freund v. Burns, 131 Conn. 380, 40 A.2d 754 (1944); Morrill v. Morrill, 83 Conn. 479, 77 Atl. 1 (1910); McMillin v. McMillin, 114 Colo. 247, 158 P.2d 444 (1954); Kraft v. Kraft, 155 A.2d 910 (D.C. Munic. Ct. App. 1959); White v. White, 160 Kan. 32, 159 P.2d 461 (1945); Bleakley v. Barclay, 75 Kan. 462, 89 Pac. 906 (1907); Naylor v. Naylor, 217 Md. 615, 143 A.2d 604 (1958) (dictum); Rankin v. Logan, 233 Miss. 631, 103 So.2d 403 (1958); Honeywell v. Aaron, 228 Miss. 284, 87 So.2d 562 (1956); Cassell v. Cassell, 211 Miss. 841, 52 So.2d 918 (1951); Haynie v. Hudgins, 122 Miss. 284, 85 So. 99 (1920); State *ex rel.* Giroux v. Giroux, 19 Mont. 149, 47 Pac. 798 (1897); Dixon v. Dixon, 76 N.J. Eq. 364, 74 Atl. 995 (1909); Cleeland v. Cleeland, 249 N.C. 16, 105 S.E.2d 114 (1958); Wilkerson v. Davila, 351 P.2d 311 (Okla. 1960); Application of Heintz, 99 N.W.2d 794 (S.D. 1959); Dowden v. Fischer, 338 S.W.2d 534 (Tex. Civ. App. 1960); Cantrell v. Cantrell, 143 W. Va. 826, 106 S.E.2d 768 (1958); Stapler v. Leamons, 101 W. Va. 235, 132 S.E. 507 (1926); Anderson v. Anderson, 74 W. Va. 124, 81 S.E. 706 (1914); see Annot., 160 A.L.R. 400 (1946); LEFLAR, THE LAW OF CONFLICT OF LAWS § 180 (1959); 27B C.J.S. *Divorce* § 391 (1959).

6. *Ibid.*

7. See cases cited note 4 *supra.*

8. 47 CALIF. L. REV. 750 (1959).

9. Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953); 47 CALIF. L. REV. 750 (1959).

court from modifying the foreign custody decree.[10] These courts, instead of applying the full faith and credit rule in affording recognition to a foreign custody decree, rely on the doctrine of comity.[11] Under this doctrine, recognition of a foreign decree is extended out of respect for that jurisdiction rather than out of obligation.[12] As a result, the court is not bound by the foreign court's determination of the facts and circumstances as they existed; nor is it required to find a change in circumstances in order to modify the custody decree. All the facts and circumstances that are relevant can be considered, and if the court concludes that the child's welfare demands a modification, the foreign decree will not be recognized.[13]

A review of the Florida Supreme Court cases indicates that this jurisdiction apparently subscribes to the majority position. In *Weldgen v. Weldgen*[14] the husband filed a separation suit in New York against his wife. On the same day the wife received service of process in New York, she brought her two children to Florida. She failed to answer the separation action filed against her and did not contest it in any manner. The New York court entered a default decree against the wife and awarded custody of the children to the husband. In habeas corpus proceedings instituted by the husband, the Supreme Court of Florida stated that:

> the issue as to whether full faith and credit should be given to the decree of the New York Court is squarely raised . . . . An issue upon the question of the custody of the child was created by the pleadings and passed upon by the New York Court . . . . It follows, therefore, that *since there has been no change of conditions the New York decree operates as an "estoppel by judgment" and should be accorded full faith and credit by the Courts of Florida.*[15]

In *Willson v. Willson*,[16] even though the wife sought to modify a *Canadian*

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10. Immerman v. Immerman, 176 Cal. App. 2d 122, 1 Cal. Rptr. 298 (1959); *In re* Svboda's Guardianship, 92 Cal. App. 2d 136, 206 P.2d 672 (1949); Barnett v. Blakeley, 202 Iowa 1, 209 N.W. 412 (1926); Durfee v. Durfee, 293 Mass. 472, 200 N.E. 395 (1936); *In re* Stockman, 71 Mich. 180, 38 N.W. 876 (1888); Bachman v. Mejias, 1 N.Y.2d 575, 136 N.E.2d 866 (1956); People *ex rel.* Herzog v. Morgan, 287 N.Y. 317, 39 N.E.2d 255 (1942); People *ex rel.* Allen v. Allen, 105 N.Y. 628, 11 N.E. 143 (1887); *In re* Hellman, 266 App. Div. 290, 42 N.Y.S.2d 53 (1943), *aff'd*, 291 N.Y. 792, 53 N.E.2d 368 (1944); *In re* Wasserman, 203 N.Y.S.2d 554 (Sup. Ct. 1960); Application of Pelaez, 22 Misc. 2d 245, 198 N.Y.S.2d 242 (Sup. Ct. 1960).

11. *Ibid.*

12. "Judicial 'comity' refers to principle under which courts of one jurisdiction give effect to law and judicial decisions of another out of deference and respect, not obligation." Neal v. State *ex rel.* Neal, 135 So.2d 891, 895 (Fla. App. 1961).

13. See cases cited note 10 *supra.*

14. 62 So.2d 420 (Fla. 1952).

15. *Id.* at 422. (Emphasis added.) See also Bennett v. Bennett, 73 So.2d 274, 278 (Fla. 1954) wherein the court, though concerned with a Florida custody decree, stated: "we are warranted in making such changes only on the basis of a change in conditions and circumstances of a substantial character which have occurred since the date of that decree . . . ."

16. 55 So.2d 905 (Fla. 1951)

custody decree, the supreme court still required a change in circumstances.[17]

Two Florida district court of appeal decisions, however, appear to take the opposite position. In *In Re Vermeulen's Petition*[18] the court considered facts similar to those in the present case. The view was expressed that in the absence of a change in circumstances, the foreign custody decree was not entitled to full faith and credit, but was entitled to great weight under the doctrine of comity.[19] Although the court concerned itself with a "change in circumstances,"[20] recognition was granted under the doctrine of comity, rather than under the full faith and credit rule. In *Rhoades v. Bohn*[21] the district court was primarily confronted with a jurisdictional issue;[22] however, it reiterated the comity principle as proposed in the *Vermeulen* case[23] and proceeded to let the trial court render a decision without any restrictions as to what evidence it could consider.[24] This application of the comity

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17. "In order for appellant to overcome the final decree of the Ontario Court she must allege and show that new facts or conditions have arisen or that old facts have been revealed that were not before and were not considered by the Supreme Court of Ontario and which would have produced a different decree if they had been before the Canadian Court." *Id.* at 906. This decision appears to show that the doctrine of comity as applied in relations between Florida and a foreign sovereign demands a strict change in circumstances before the foreign decree will be modified. Taken in conjunction with Weldgen v. Weldgen, 62 So.2d 420 (Fla. 1952) it appears that the supreme court has adopted a strict change in circumstances rule. This rule demands that regardless of where the prior decree was rendered, if the court had proper jurisdiction, the decree operates as an estoppel by judgment to the facts as they then existed. This would limit the Florida trial court's consideration to only those facts which have occurred since the rendition of the foreign decree.

A sufficient change of circumstances was found in Eddy v. Staufer, 160 Fla. 944, 37 So.2d 417 (1948). There, an Illinois court gave custody of the child to the father and subsequently modified that decree allowing the mother to have the child for four weeks. The Florida Supreme Court on appeal stated: "It is our opinion that the passage of time has wrought such a change of conditions as to justify the application of the almost universal rule that the Court where the minor is found may make an interlocutory order when intervention is necessary for the welfare of the child." *Id.* at 947, 37 So.2d at 418.

18. 114 So.2d 192 (Fla. App. 1959).

19. "[T]he decree . . . is entitled to great weight and respect under the doctrine of comity absent a showing by clear and convincing evidence that such new conditions have arisen since rendition of the decree as would justify a change in custody of the child, or that old facts have come to light which had they been known to the chancellor would have impelled a different conclusion." *Id.* at 195.

20. "The record before us is devoid of evidence tending to show that since the entry of the Oregon decree appellant's circumstances have so changed as to render him incapable of caring for and rearing his child . . . . Nor is there any proof of such misconduct on the part of the appellant as would justify a forfeiture of the custodial rights granted to him by the court of original jurisdiction." *Ibid.*

21. 114 So.2d 493 (Fla. App. 1959), *writ discharged*, 121 So.2d 777 (Fla. 1960).

22. In *Rhoades* the parents were divorced in Wisconsin, where the mother was awarded custody of the child. The custody decree was subsequently modified giving custody to the father. The father then took the child and movevd to Florida. *While the father and child resided in Florida,* the Wisconsin court again modified the decree in favor of the mother. The mother then sought to enforce the modified decree in Florida.

23. See note 19 *supra.*

24. "[T]he trial judge is authorized in his discretion to consider granting the relief sought under the rule of comity. In this event, due process would require that defendant be afforded the opportunity of presenting evidence on the custody issue. *Upon consideration of the record as a whole* the trial judge will then be authorized to enter a proper custody order . . . ." (Emphasis added.) Rhoades v. Bohn, 114 So.2d 493, 499 (Fla.

principle to foreign custody decrees by the First District Court of Appeal has resulted in decisions inconsistent with the rule expounded by the Florida Supreme Court.[25]

In the present case, the trial court considered itself bound by the Mississippi custody decree and would consider only those facts that had occurred subsequent to that decree in order to determine whether there was a change in circumstances which would justify a modification. This view appears to be in full accord with the Florida Supreme Court's view.[26] On appeal, however, the same district court which decided *Vermeulen* and *Rhoades* again applied the comity principle. It stated that under this doctrine, Florida courts are not bound to consider only those facts and circumstances which occurred subsequent to the rendition of the foreign decree. The court was of the opinion that Florida courts may consider the manner in which the proceedings were conducted in the foreign jurisdiction to determine whether recognition should be afforded to its decree under the doctrine of comity.[27]

The First District Court of Appeal decisions in *Vermeulen*, *Rhoades* and now *Neal* permit a trial court to retry "the issue of custody to the same extent as if the [foreign] . . . court had never acted thereon."[28] However, this writer would emphasize that the view expressed in these cases appears to be contra to the rule expounded by the Florida Supreme Court in *Willson*, *Weldgen* and *Eddy v. Staufer*.[29] The supreme court's view appears to lead toward a more desirable solution. Once a foreign court, having proper jurisdiction, considers the relevant facts and circumstances and decides the custody issue, the parties should be precluded from contesting that issue as to those facts. This, however, does not prevent one of the parties from obtaining a modification of that decree at a subsequent date based on

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App. 1959), *writ discharged*, 121 So.2d 777 (Fla. 1960). It is not clear whether the court must limit itself to evidence of facts which have occurred since the rendition of the foreign decree, or whether the court is unrestricted in considering the record as a whole. It is submitted that under the comity doctrine, as made clear in the *Neal* case, the court is under no restrictions as to the consideration of evidence.

25. The present case relied heavily on the decision in *Rhoades*. The court evidently considered that since the supreme court denied certiorari in *Rhoades*, it had adopted the district court's view on the comity issue. This conclusion appears to be erroneous. An examination of the supreme court's opinion shows that the court was concerned with the jurisdictional issue only and that the comity issue was not raised.

26. See notes 15 and 17 *supra*. See also Weldgen v. Weldgen, 62 So.2d 420, 422 (Fla. 1952).

27. "[T]he mother received no actual notice that the initial judgment rendered in her favor had been reversed . . . . It is equally clear that the mother did not appear before the trial court upon the remand of the cause, nor was she represented by counsel . . . . These are factors which the trial court of Duval County was entitled to consider in reaching a conclusion as to whether the final decree rendered in Mississippi is entitled to recognition and enforcement under the doctrine of comity." Neal v. State *ex rel.* Neal, 135 So.2d 891, 896 (Fla. App. 1961).

28. *Id.* at 901 (Sturgis, J., dissenting).

29. 160 Fla. 944, 37 So.2d 417 (1948); see note 17 *supra*.

facts and circumstances that have occurred since the rendition of the original decree.

If a case similar to the present one arises in the future, there appears to be a sufficient conflict in the cases discussed herein to enable the Florida Supreme Court to grant a writ of certiorari.[30] Thus, a uniform rule as to recognition of foreign custody decrees could be established throughout the state.

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IMPLIED WARRANTY—SALES BY RETAILERS—THIRD PARTY BENEFICIARY

The plaintiffs, a father and his minor son, brought suit against the retailer and manufacturer of playground equipment for injuries sustained by the minor son when his finger was amputated while using a piece of their equipment. The father had made the purchase from the retailer. Both plaintiffs appealed from the decision dismissing the suit against the retailer for breach of implied warranty of merchantability. On certiorari to the Florida Supreme Court, *held*, reversed: an action for breach of implied warranty may be maintained against the retailer by the father, who was in privity of contract with the retailer, and by the minor son, who was the "intended beneficiary" under the contract of sale of goods intended for family or household use. *McBurnette v. Playground Equip. Corp.*, 137 So.2d 563 (Fla. 1962).

The early common-law courts developed the rule that an action for breach of an express or implied warranty of the fitness of goods would not lie in the absence of a contractual relationship between the parties at suit.[1] The general theory was that to permit suits by unknown purchasers or users would retard technological progress and development of useful products.[2] The rule was re-enforced from a practical pleading point in that a warranty

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30. FLA. CONST. art. V, § 4(2) states: "The supreme court may review by certiorari any decision of a district court of appeal . . . that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law . . . ."

1. Prior to the 1800's the courts applied the maxim "caveat emptor" in the absence of express warranty or fraud. Kurriss v. Conrad & Co., 312 Mass. 670, 46 N.E.2d 12 (1942). For a history of regulation of products and their sale in the market place during the middle ages, see Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931); Murray, *Implied Warranty Against Latent Defects: An Historical Comparative Law Study*, INS. L.J. 547 (1961).

2. "The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty." Winterbottom v. Wright, 10 M. & W. 109, 115, 152 Eng. Rep. 402, 405 (Ex. 1842).